

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1561 OF 1992

Abhinava Sahakar Education Society,))
a society registered under the)
Societies Registration Act, 1860)
and also as a Public Trust, under)
the Bombay Public Trusts Act, 1950)
having its office at M.I.G.Colony,)
Gandhi Nagar, Bandra (East),)
Bombay - 400 051.).. Petitioner

Vs.

1. The State of Maharashtra,)
2. The Municipal Corporation of)
Greater Bombay, having its)
office at Mahapalika Marg,)
Fort, Bombay 400 001.)
3. M.I.G.Cricket Club,)
having its office at)
M.I.G.Colony, Gandhi Nagar,)
Bandra (East),)
Bombay 400 051.)
4. Maharashtra Housing & Area)
Development Authority,)
5. Bombay Housing & Area)
Development Board,)
both having offices at)
Griha Nirman Bhavan,)
Gandhi Nagar, Bandra (East),)
Bombay - 400 051.).. Respondents

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Ms Vaishali V.Thorat for the petitioner.

Ms Madhulata Kajale, AGP for respondent Nos.1, 4 and 5.

Shri Vinod Mahadi for respondent No.2-BMC.

S/Shri C.J.Sawant with Milind Sathe i/b Ghanekar & Co.
for the respondent No.3.

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CORAM : R.M.S.KHANDEPARKAR &
V.M.KANADE, JJ.

DATED : 5TH SEPTEMBER, 2005.

ORAL JUDGMENT : (Per R.M.S.Khandeparkar, J)

1. Heard. By the present petition, the petitioner is challenging the notification dated 24th April, 1992 stated to have been published on 7th May, 1992 in exercise of powers under Section 31(1) of the Maharashtra Regional Town Planning Act, 1966, thereafter called as "the said Act", as also seeking direction to restrain the respondents from executing or acting upon the said notification and further directing the respondents to restore the reservation of plot bearing No.341 at MIG Colony, Gandhi Nagar, Bandra (East), Mumbai - 400 051 for "School and Cultural Centre".

2. The facts relevant for the decision in the matter are that, the petitioner-society, which is registered under the Societies Registration Act, 1860, was allotted a plot of land admeasuring 7224 sq. yards bearing part of Survey No.341, situated at Gandhi Nagar, Bandra (East), Mumbai. The respondent Nos.4 and 5, with the consent of the respondent

No.2-BMC in February, 1965, under a resolution granted the said plot of land in the form of a lease for a period of 99 years on a premium equivalent to the price then fixed and payable annually by way of instalments. On the measurement of the plot, the area thereon was found to be 7301.25 sq.yards. When the petitioner-society proposed to construct a school building thereon, it was revealed that the area in question was reserved for a play ground in the draft development plan. The same was brought to the notice of the predecessor of the respondent Nos.4 and 5 by the petitioner by its letter dated 28th May 1968. In answer, the petitioner was asked to get the user of the land changed in accordance with the provisions of law. Meanwhile, the said Act had come into force since 20th December, 1966. Consequently, the petitioner moved for change in user of the land of the suit area which was processed in accordance with the provisions of the said Act, and ultimately, a Notification dated 10th April, 1985 in exercise of the powers under Section 37(2) of the said Act came to be issued and the same was published in the Government Gazette on 25th April, 1985. By the said notification, the land admeasuring 6103.53 sq. meters, out of the Survey No.341 (Part) of Bandra, was excluded from the site reserved for the play ground, and the land so released was earmarked for the school

and cultural centre in the development plan of the area.

3. It is the case of the petitioner that by letter dated 15th November, 1978, the Housing Secretary of the respondent No.1 and the Chief Executive Officer and Vice President of the Maharashtra Housing & Area Development Authority- the respondent No.4, addressed to the Secretary of Urban Development Department of the respondent No.1 had requested for modification of the draft development plan showing the user of the said plot for school purposes. By the letter dated 1st January, 1979, the Senior Town Planner of the Bombay Metropolitan Regional Development Authority called upon the petitioner to furnish certain details and plans, which was duly complied with. By the letter dated 12th November, 1979 addressed to the Personal Assistant to the Minister for Education, his intervention was sought for the necessary change in the user of the land for the purposes of school. By the letter dated 10th August, 1983, the Under Secretary to the Urban Development Department of the State, the respondent No.1, informed the petitioner that the instructions to the Bombay Municipal Corporation had been issued for change of user of the said plot for school purposes. In February, 1984, the Bombay Municipal Corporation

passed the resolution sanctioning user of the said plot for the petitioner-society for the purposes of a school, and consequently the said notification dated 10th April, 1985 came to be issued. The fact about the change of user of the said plot was also confirmed to the petitioner by the letter dated 15th April, 1986 written by the Executive Engineer, Town Planning (Division Plan) of the respondent No.2.

4. It is further the case of the petitioner that, during the period of 1985-86, in the cases of various meetings with the concerned officers of the respondent No.2 as well as the correspondence between the petitioner and those officers in relation to the change of user of land in question, it was revealed to the petitioner that the respondent No.3 had also moved to the respondent No.1 for change of user of the said plot for a "cricket play ground". In June, 1986, the petitioner was called by the then Minister of State for Education and informed that the plot in question be surrendered to the respondent No.3 and in its place, the petitioner-society would be allotted another plot of land by the Corporation. Similar efforts were repeatedly made on the part of the respondent No.3 to convince the petitioner to shift to another plot, as the plot in question was required by the respondent No.3 for its play-ground. In reply to

the letter dated 10th November, 1986, by the petitioner-society for permission to erect a compound wall to the said plot, as there were threats of encroachment at the instance of the respondent No.3, the Bombay Municipal Corporation on 24th November, 1986 gave the said permission and informed the petitioner to submit development plan to the Government, while informing that in the proposed development plan submitted to the Government-the respondent No.1, the respondent No.2-BMC, by mistake, had shown the plot in question as "cricket club and play-ground", and therefore, directed the petitioner to approach the Government to get the mistake rectified. Thereupon, the petitioner by the letter dated 8th December, 1986 approached the respondent for getting the mistake rectified and the said letter was acknowledged under the letter dated 29th January, 1987 by the Respondent No.2 informing that having taken note thereof, appropriate action would be taken. However, to its surprise, the petitioner came across the notification dated 24th April, 1992 published on 7th May, 1992 which revealed that the respondent Nos.1 and 2 in exercise of powers under Section 31(1) of the said Act had sought to modify reservation of the land in question along with some other plots and instead of the land in question being shown reserved for school and cultural centre, it was shown as reserved for

playground. Hence the present petition.

5. It is the case of the respondents that the modification which was carried out under the notification dated 10th April, 1985 was a minor modification in relation to a specific plot of land. However, the draft development plan for the entire area was already under preparation and after hearing the necessary objections and suggestions, the revised draft development plan was submitted on 29th April, 1986 by the Bombay Municipal Corporation with necessary modifications. It is further the case of the respondents that such draft was, infact, prepared on 16th October, 1984 and final plan with necessary modifications was submitted to the Government on 29th April, 1986 which was accepted by the Government and was ultimately considered in accordance with the provisions of law, finalised and the notification in that regard was issued on 24th April, 1992 and published on 7th May, 1992 whereby the land in question was shown as reserved for the purpose of playground. In the process, the interest of the petitioner was also safeguarded by reserving a plot towards the eastern side of the plot in question to be reserved for the school and cultural centre. Such finalization of the plan was done after hearing all the interested parties including the petitioner, and

this is obvious from the fact that even the petitioner had approached the D'Souza Committee, which was constituted for the purpose of finalization of the modifications of the draft plan. The school which was sought to be opened by the petitioner was permanently closed since 1990 and on account of failure on the part of the petitioner to pay the premiums payable to MHADA, the allotment in favour of the petitioner is liable to be cancelled. In any case, it is the case of the respondents that the possession of the land in question was delivered to the Corporation and the Corporation in turn, leased the same to the respondent No.3 since September, 1974.

6. Upon hearing the learned Advocates for the parties and on perusal of the records, the points which arises for consideration in the matter are whether the notification dated 24th April, 1992 issued in exercise of powers under Section 31(1) of the said Act has been issued in due compliance of the provisions of the said Act and that whether the decision making process in that regard suffers from any arbitrariness or illegality, and results in vitiating the said notification as sought to be contended on behalf of the petitioner?

7. Plain reading of the notification dated 24th

April, 1992, undoubtedly discloses that by the resolution dated 23rd December, 1976, the Corporation, being the planning authority for the concerned area, had declared its intention to revise the development plan, and in that regard, necessary declaration was issued under Section 38 read with Section 23(1) of the said Act and published in the Government Gazette, Part-II, on 13th January, 1977. The same was followed by the survey of the lands in terms of Section 25 of the said Act, and the notice under Section 26(1) was thereupon published on 30th April, 1984, inviting objections and suggestions to the revised draft development plan. After consideration of such objections and suggestions in accordance with the provisions of Section 28 of the said Act and after making necessary modifications or changes in the draft notification plan, a report came to be submitted on 29th April, 1986 under Section 30(1) of the said Act to the Government of Maharashtra by the Corporation for necessary sanction under Section 31(1) of the said Act. Further, in exercise of powers under the first proviso to sub-section (1) of Section 31 of the said Act, the Government by its notification dated 31st March, 1992 extended the period for sanctioning the draft development plan upto 30th June, 1992 and meanwhile granted the sanction under notification dated 24th April, 1992 which came to be published on

7th May, 1992. Though the notification on the face of it discloses compliance under Chapter III(b) of the said Act, the contention of the petitioner is that it nowhere discloses any reference to the notification dated 10th April, 1985 under which the changes were finally approved in exercise of powers under the said Act. On the other hand, it is the contention of the respondents that it was a minor modification whereas the modifications carried out under the impugned notification are major modifications and in any case the impugned notification could be said to be confirming the development plan in relation to the plot in question in terms of Section 37(2) of the said Act.

8. Undoubtedly, there is no reference of whatsoever nature to the notification dated 10th April, 1985 in the impugned notification. It is also not in dispute nor can be disputed that the notification dated 10th April, 1985 stated to have been issued in exercise of powers under Section 37(2) of the said Act. It is, however, the contention of the respondents that in 1985, the draft development plan was not finalised and the modifications which were approved under the 1985 notification were minor modification in relation to a particular plot.

9. Section 37(2) of the said Act provides that the State Government may, make such inquiry as it may consider necessary and after consulting the Director of Town Planning by notification in the Official Gazette, sanction the modification with or without such changes, and subject to such conditions as it may deem fit, or refuse to accord sanction. If a modification is sanctioned, the final Development plan shall be deemed to have been modified accordingly. The sanction to the modifications which is spoken of under Section 37(2) of the said Act refers to the modifications in the final development plan and not in the draft development plan. Any sanction order in exercise of powers under Section 37(2) of the said Act has necessarily to relate to the final development plan and modifications would result in changes in such final development plan. It does not relate to any draft development plan. It is to be noted that the finalisation of development plan is provided under Section 31 of the said Act. The Section 37(1) speaks of modification of final development plan and not of the draft development plan. Being so, the contention that the notification dated 10th April, 1985 related to the modifications in the draft development plan pending finalisation thereof cannot be accepted.

10. It was also sought to be contended that the

said modification can be construed to relate to the plan which was already finalised under the Planning Act which was in force prior to the enforcement of the said Act. First of all, no such case has been pleaded by the respondents, particularly by the respondent No.1 or 2. Even otherwise, it is difficult to accept any such contention as, according to the respondents themselves, the intention to prepare the draft development plan was made clear by the Corporation under the Resolution dated 23rd December, 1976 and accordingly, the draft development plan was prepared and was displayed for objections and suggestions from the public as long back as on 30th April, 1984. Obviously, it was prior to 10th April, 1985. At this stage, it is also to be noted that the sanction for finalisation of the draft development plan, which is spoken of under Section 31, need not relate to the entire area for which the planning authority exercises its jurisdiction. Such finalisation can be even for a part of that area. Sub-section (1) of Section 31 clearly speaks of "sanction the draft Development plan submitted to it for the whole area, or separately for any part thereof, either without modification, or subject to such modification....." Being so, once the record discloses that the draft development plan was prepared in terms of the provisions of law comprised under Chapter III(b), and

it was placed for objection and suggestions from the members of the public on 30th April, 1984, and thereafter, a part of such development plan was sanctioned by the authorities, merely because the notifications refer to a provision of law comprised under Section 37, it cannot be said to be in relation to the powers having been exercised in terms of those provisions by the Corporation. In order to understand the provisions of law under which the authority has exercised its power, it is necessary to ascertain the facts of the matter and thereafter apply the provisions of law. Mere reference to a wrong provision of law will not decide the source of power under which the act is performed. The very fact that the draft development plan was prepared and placed for objections and suggestions from the members of the public on 30th April, 1984 and thereafter, by the notification dated 10th April, 1985 the respondents had finalised the reservation of the land in question to be for school and cultural centre, even though the notification on the face of it refers to the exercise of powers under Section 37(2) of the said Act, for all the legal purposes, it will have to be construed as having been issued in exercise of powers under Section 31 of the said Act in relation to the area in question. It is pertinent to note that there is no dispute on the point that subsequent to the draft

development plan was prepared on 30th April, 1984, there was no finalisation of the said plan in terms of Section 31 of the said Act otherwise than the notification of 10th April, 1985. Being so, there was no occasion for the respondents on 10th April, 1985 to exercise the powers under Section 37(2) which clearly speaks of modification in the final development plan.

11. Once it is apparent that on 10th April, 1985, the development plan in relation to the land in question was finalised in accordance with the provisions of the said Act, and particularly in terms of the provisions of Section 31, there was neither any occasion nor power to the respondents to pass any order in exercise of the powers under Section 31 of the said Act in relation to the same land. In terms of the provisions of law, once a draft plan is finalised for any part of the one under the jurisdiction of the concerned authority, it can be modified only in exercise of powers under Section 37 of the said Act, and not otherwise.

12. Even otherwise, as rightly submitted by the learned Advocate for the petitioner, the notification dated 24th April, 1992 nowhere refers to the notification of 10th April, 1985. Even assuming that the notification of 10th April, 1985 was pending

finalisation of the draft development plan dated 31st April, 1984, once it was apparent from the record that the concerned authorities on the application of their mind had allowed the change of user in relation to the land in question and the notification in that regard having been issued on 10th April, 1985 and the same being available to the concerned authorities, it was necessary for such authorities to refer to the said decision before arriving at any modification in the user of the land in question. We are aware of the limitations of the Court in going into the decision of the authorities on the point of change of user. However, once the authority comes to a decision that the land is required to be used for a particular purpose and accordingly grants permission to change the user, then further modification of such change cannot be allowed arbitrarily or without any reason for the same. It obviously required application of mind and such application of mind should reveal from the order or records pertaining to the grant of such change of user of the land. Even though the respondent Nos.1 and 2 have filed the affidavits, they have not been able to disclose any exercise on the part of the concerned authorities regarding consideration of the notification dated 10th April, 1985 in any manner. What is pertinent to note is that once the notification dated 24th April, 1992 did not

make any reference to the notification of 10th April, 1985 and when there was a specific contention about the non-compliance of the provisions of law and the notification of 10th April, 1985 having been totally ignored while issuing the notification dated 24th April, 1992, it was certainly expected from the respondent Nos.1 and 2 to disclose such exercise having been done by the competent authority which could reveal application of mind by the authority who had granted change of user in relation to the land in question contrary to the one which was allowed under the notification dated 10th April, 1985, and the notification dated 24th April, 1992 being issued under Section 37(2) in relation to the land in question. There is absolutely no whisper about the same in the affidavits filed on behalf of either of the respondents.

13. Such an explanation on the part of the respondents was absolutely necessary in view of the statutory provisions comprised under Section 37(2) of the said Act which speaks of the powers of the Government to grant modification in the final development plan, whereas, Section 31(1) speaks of finalisation of the draft development plan either for the whole area or separately for any part thereof. Once it was known to the respondents that the draft

plan was prepared on 30th April, 1984 and was subjected to the objections and suggestions from the members of the public and thereafter, on 10th April, 1985, a part of such area was finalised and notified, mere reference in the notification to Section 37(2) of the said Act could not be construed to mean that the powers had been, in fact, exercised under Section 37(2). It will have to be construed as having been exercised under Section 31(1) of the said Act, and for the same reason, it was necessary for the respondents to explain as to how and why the said notification dated 10th April, 1985 could not be considered or was not necessary to be construed while issuing the notification dated 24th April, 1992.

14. For the reasons stated above, therefore, as rightly submitted by the learned Advocate for the petitioner, the notification of 24th April, 1992 as far as it relates to the plot in question, cannot be said to have been issued in exercise of powers under Section 31(1) of the said Act. At the most, the respondents, if at all interested in the change of user of the land in question, could have exercised the powers under Section 37(2) of the said Act. However, for that purpose, it was necessary for the respondents to follow the procedure contemplated under Chapter III(b) of the said Act. Neither the notification

dated 24th April, 1992 nor the affidavit by the respondents disclose such procedure having been followed after issuance of the notification dated 10th April, 1985 and prior to issuance of notification dated 24th April, 1992 in relation to the land in question.

15. The contention of the respondents that the petitioner was infact heard and it had represented against such modifications by approaching the D'Souza Committee is totally devoid of substance. Once it is clear that the draft plan was prepared on 30th April, 1984 after hearing the objections and suggestions from the public, the Corporation submitted the final draft to the Government on 29th April, 1986, and further the letter which was addressed to the D'Souza Committee by the petitioner was on 8th December, 1986, it requires no further discussion to reject the contention of the respondents that by the said letter, the petitioner had represented against the modifications or that the opportunity was availed by the petitioner of being heard in the matter by the D'Souza Committee. If the draft itself was finalised on 29th April, 1986 by the Corporation, it can, by no stretch of imagination, be believed that the letter dated 8th December, 1986 by the petitioner to the D'Souza Committee was, in any manner, relating to the hearing on the point of

modification of the draft plan. Besides, the letter of 19th/24th November, 1986 by the Municipal Commissioner to the petitioner, copy of which is placed on record by the Petitioner, clearly reveals that much prior to the letter dated 8th December, 1986, the Corporation had already submitted the proposal for finalisation of the draft and in the said proposal, the land in question was, by mistake, shown as reserved for cricket club and cultural centre, and the Municipal Commissioner himself had admitted all these facts. Hence, the contention of the respondents that the letter dated 8th December, 1986 by the petitioner was on the point of change of draft plan has to be rejected.

16. It was also sought to be argued that consequent to the modification in the plan, an area towards eastern side of the plot in question has been reserved for the petitioner's school. It is not the question of reservation of an area for the petitioner or for that purpose to any institution or person when it relates to the matter pertaining to the changes to be brought about in the development plan. Once the authorities apply their mind and arrive at the conclusion that a particular area is suitable and appropriate for a particular purpose, and accordingly finalise the development plan for a particular area,

in case of any further change as such in the reservation of the land, the same should disclose the procedure prescribed having been followed and the reasoned decision having been arrived at on proper application of mind on the aspect of requirement of such change. The changes in the user of the land, once declared as forming part of the development plan, could not be allowed in total disregard to the decision which is once taken as necessary for the planned development of that area. The decision making process should reveal the application of mind by the concerned authorities in that regard and due compliance of the statutory provisions to bring about such changes. Merely because one of the parties is sought to be satisfied in relation to his grievance on account of change in the development plan, that by itself cannot be a justification to bring about the changes in the development plan. Being so, merely because certain other area is reserved for development of a school of the petitioner, that itself cannot be a justification to contend that the illegalities committed by the authorities in the process of grant of modifications in the development plan be condoned.

17. It was also sought to be argued on behalf of

the respondents that the allotment in favour of the petitioner is bound to be cancelled on account of

failure on the part of the petitioner to pay the premium and further that the area in question has already been allotted to the respondent No.3. Undisputedly, there is nothing on record to disclose that the allotment of the land in favour of the petitioner has been cancelled. Even the affidavit filed on behalf of the respondent No.4, who is the competent authority in that regard, nowhere discloses the termination of the allotment of the land in favour of the petitioner. Once the allotment of the land in favour of the petitioner is not cancelled, one fail to understand on what basis the land can be claimed to have been allotted in favour of the respondent No.3.

18. At the time of issuance of rule on 27th July, 1992, the interim relief was passed to the effect that "interim order restraining respondent no.3 from in any manner making use of site No.108 referred to in the impugned notification. The said site No.108 shall be used only as a public play-ground pending the disposal of the petition." In other words, for all purposes, no change of whatsoever nature in loco was allowed to be made during the pendency of the petition. The impugned notification is of dated 24th April, 1992. Being so, once it is held that the impugned notification has not been issued in compliance with the provisions of law and the decision making process

in that regard does not disclose the opportunity to the petitioner of being heard in the matter and the consideration of the notification dated 10th April, 1985, and application of mind by the concerned authorities before issuing the impugned notification, for the reasons stated above, therefore, the impugned notification is liable to be quashed and set aside to the extent it relates to the plot in question. Consequently, the respondents will have to be also directed to restore the reservation of the plot in question in accordance with the notification dated 10th April, 1985.

19. For the reasons stated above, therefore, the petition succeeds and the rule is made absolute in terms of prayer clauses (a) and (b) to the extent it relates to the plot in question, with costs.

20. At this stage, the learned Advocate for the respondent No.3 prays for stay of this order, which is objected to on behalf of the learned Advocate for the petitioner. However, we are inclined to grant stay to this order for a period of eight weeks from today. Order accordingly.

(V.M.KANADE, J)

(R.M.S.KHANDEPARKAR, J)